Filed 3/17/15 In re N.B. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re N.B., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. S.B., Defendant and Appellant.	F069691 (Super. Ct. No. 517017) **OPINION**

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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S.B. (father), the incarcerated father of newborn daughter N.B., appeals from the juvenile court's order denying him family reunification services and in-person visitation with N.B. We affirm.

FACTS AND PROCEEDINGS

N.B. was born in April of 2014. At the time of her birth, father was incarcerated awaiting trial on charges of possession of a controlled substance, possession of burglary tools, obstructing a public officer; and various warrants for possession of narcotic controlled substance, false identification to specific peace officers, inflicting corporal injury on a spouse/cohabitant, and violation of parole. The victim of the alleged corporal injury was N.B.'s mother, Cynthia S. (mother).[1]

At the time N.B. was born, mother was participating in reunification services for her two older children, Shawn R., age 7, and Natalie R., age 5. Father is not the father of those minors and therefore not a party to the ongoing dependency action.

The current case began before N.B.'s birth, when mother was brought to the attention of Stanislaus County Community Services Agency (agency) in January of 2013 when police were called to check on possible squatters. Mother, her two children and father were found in the home. The children were sleeping on blankets next to a fire in an open fireplace without a screen. The officers observed hot ash popping out of the fireplace and onto the children's bedding. There was no electricity in the house and food was being stored on the counter. Marijuana was found in the bathroom accessible to the children. Mother was combative and had to be restrained. Father, who had an outstanding warrant for jumping bail on a charge of possession of drug paraphernalia, was found hiding in a closet. Mother reported that there was domestic violence between her and father and that the children witnessed the violence. Father admitted ongoing

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[1] Mother is not a party to this appeal.

domestic violence, but claimed the children were not present when it happened. The oldest child reported that father was "always mean" to mother. Father also admitted using marijuana and methamphetamine in the home.

The two older children were declared dependents in April of 2013. Mother was given a reunification plan, including a domestic violence program and substance abuse services. Four months later, in August of 2013, mother admitted she had been seeing father and was five or six weeks pregnant with his child. She also stated he was not in drug treatment and had a warrant out for violation of parole. Mother failed to understand how her relationship with father affected her children.

In September 2013, mother stated that she was still having a difficult time staying away from father and was counseled to continue working on this issue in her individual counseling. Mother's continued relationship with father and the impact it had on her children was also the topic of her service providers meeting in November of 2013; father was arrested that month. In January 2014, mother told the social worker that she writes to father in prison and wished to continue a relationship with him. According to mother, she "was a good mom on meth" and father was a good father to her children even while he was on methamphetamine. Mother did not understand the agency's concern about father and her relationship with him, nor did she understand why her children did not like him.

In March 2014, mother and service providers again discussed her relationship with father. She was advised that her children's continued fear of father and mother's inability to separate from him contributed to the agency's recommendation to terminate services for the children. Mother then claimed that she was not in a relationship with father and would protect the children. But that same month, the agency obtained multiple letters written by mother to father in jail, which detailed her continued love for him and her intention to allow him to be the father of her children. In the letters, mother stated that,

when she was done with Child Protective Services (CPS), she and father would be able to be together again and she would not keep him from the children.

Mother, while receiving reunification services, had completed both a residential and outpatient treatment program and was residing in a clean and sober facility. But despite the fact that she was repeatedly told that her children were afraid of father and that her relationship with him was a barrier to her reunification with the children, mother was unable to separate from him for the benefit of her children. She continued to be dishonest with the agency on this issue and it was therefore recommended that services as to the children be terminated. It was also decided that N.B. would be detained from mother at birth, which occurred in April 2014.

A petition was filed alleging that N.B. came within the provisions of Welfare and Institutions Code section 300, subdivisions (b), (g) & (j).[2] Father was listed as N.B.'s alleged father. As he was incarcerated at the time of N.B.'s birth, he was unable to sign a declaration of paternity.

Detention Hearing

The social worker met with father before the April 11, 2014, detention hearing, and father signed a notice of address listing the custody facility as his address and that he was otherwise transient. He stated that he had been through many substance abuse programs before. Father had a preliminary hearing scheduled in June of 2014. He was given a referral for a drug and alcohol assessment, parenting and individual counseling, and encouraged to participate in any program available to him while incarcerated.

During the detention hearing, father's appointed attorney requested that he either be declared the presumed father or that DNA testing be ordered. When the juvenile court

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[2] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

reminded him that DNA testing would only elevate father to biological and not presumed status, it was decided that he would sign a declaration of paternity at the next hearing (which would elevate him to presumed father status). A contested detention hearing was set for April 15, 2014.

At the contested detention hearing, the agency requested that judicial notice be taken of the files for the older children. Father was not present at the hearing, but represented by counsel. The juvenile court ordered N.B. detained. A contested jurisdiction and disposition hearing was set for May 6, 2014.

Jurisdiction/Disposition Hearing

The report prepared in anticipation of the jurisdiction/disposition hearing included father's criminal history report, reflecting continuous arrests from 2002 until the November 2013 arrest for which father was currently in custody. The report listed the following convictions: 2003 felony vehicle theft; 2004 misdemeanor for possession of a controlled substance; 2005 felony false personation of another; 2007 first degree burglary for which he received a two-year prison sentence; 2008 obstructing an officer and a parole violation with a return to prison; and two 2010 parole violations for which he was again returned to prison. He was currently charged with possession of a controlled substance, possession of burglary tools, and warrants for possession of a narcotic controlled substance making false identification to a peace officer, inflicting corporal injury on a spouse/cohabitant, and a violation of parole.

Relatives, including three of father's relatives, were notified of N.B.'s detention. Father's sister submitted an application and was told it would be processed if and when father was declared a presumed father. But N.B. was placed into the foster home with the older children, per mother's wishes.

The report stated that, as an alleged father, father was not entitled to reunification services but that, if father achieved presumed status, it was recommended that services be

denied, as he was currently in custody with an unknown release date and father had a significant history of arrests. The agency opined that, because of both substance abuse and domestic violence issues, it was unlikely that father could complete services in the six months allowed to reunite with such a young child.

Attached to the report were the case notes from the older children's case, as well as the letters mother sent father. In one letter, mother states that one of her older children expressed often how mother and father fought and how he does not want to see anyone hurt like that. But in the same letter, mother states "when you get out you can sneak in threw [*sic*] the bedroom window every night like good ol' times …." In another letter, mother wrote to father stating that she needed him to "get into whatever programs and services you can to do with kids or anger management," because mother's social worker was "pushing for you to have no contact order with all of us. I need you to prove her wrong." In another letter, mother writes, "You know I love you and want for you to be the dad to all our children."

At the May 6, 2014, contested jurisdiction/disposition hearing, father's status was elevated to that of presumed father, as he completed a declaration of paternity. Before father took the stand, his attorney invoked the Fifth Amendment in an attempt to prevent his testimony. It was determined that the Fifth Amendment privilege would be dealt with on a question by question basis.

Father then testified that he did not know about the status of his relationship with mother as it was "off and on." He agreed that he had been corresponding with mother since November of 2013 when he was placed in custody, and he last received a letter from her in April of 2014. According to father, he loved mother and wanted to be a family with her and her three children when he got out of jail.

Father testified that he needed treatment for drug use, domestic violence and parenting classes, and would not be a good parent without them. Father had gone

through drug treatment before, in 2004, 2006, and 2008. He claimed to have successfully completed the program in 2008 and had done subsequent outpatient treatment, including the 12-step program, although he was "a little stubborn" and did not "put [himself] out there to be helped." He also claimed to have completed four previous parenting classes, although he did not have any children at the time, and he completed an anger management course in 2004. Father stated that he would try the Salvation Army program when he is released. He thought the agency had given him a letter explaining the referrals for services, but he had not read the entire letter as yet. He was currently attending a program in jail that did not include substance abuse treatment. When asked in what way he wanted to change, father said, "[p]retty much the drug part." Although AA/NA was available at the unit he was housed in, he had gone only once several weeks earlier.

Father invoked the Fifth Amendment when asked if he was using methamphetamine with mother, although he acknowledged that he had seen mother using it. He also invoked the Fifth Amendment when asked if he struck mother, but did claim that she struck him. Father claimed not to know how the children reacted when that happened. Father had not yet had a preliminary hearing on his current charges, so he had no idea of when he might be released.

After a recess in the proceedings, it was announced that a resolution had been reached as to mother. The agency recommended that it would continue services for the older children to the 18-month point, which would be mid-July. It would also include mother receiving services for N.B. The juvenile court admonished mother regarding her relationship with father, stating that, while it could not dictate whether she continued the relationship, it would be a matter of her choosing father or choosing the children. The juvenile court noted that the children were afraid of father and mother needed to understand this and put them "first." The juvenile court noted that father had a lot of

work to do before he could be a father to his daughter and that it would be difficult because he was "incarcerated a lot."

Counsel for N.B. stated that it was imperative that mother deal with issues of domestic violence, noting the older children loved their mother and were afraid of father.

The matter as to father was continued. In the interim, the agency proposed a plan for mother which included a supervised monthly visit for father upon release from incarceration. During father's incarceration, visitation would be in the form of cards, letters, pictures or phone calls.

When the hearing reconvened, no further testimony was offered by any party. The agency continued to recommend no services for father as he was in custody, had no relationship with the newborn minor, and was only considered the presumed father by the fact that he signed a declaration of paternity while in court. The agency also stressed that the charges for which father was currently in custody included a charge in which mother was the victim. Counsel for N.B. concurred with the agency's position.

Counsel for father argued that father, although in custody, had not yet been convicted of anything.

In its ruling, the juvenile court noted that father realized he had a substance abuse problem and needed assistance in that area, as well as in domestic violence and parenting, but that any progress he had made was "minimal." The juvenile court found, by clear and convincing evidence under section 361.5, subdivision (e)(1),[3] that it would be detrimental to N.B. to offer reunification services to father. It specifically found that father was in custody for the same issues that were of concern in the case: substance abuse and domestic violence. N.B., barely one month old, had no relationship with father. The

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[3] Section 361.5, subdivision (e)(1) provides that reunification services be provided an incarcerated parent unless it is determined by clear and convincing evidence that those services would be detrimental to the child.

juvenile court found there was no indication father would be released from custody any time soon, and that it was very likely it would be longer than the amount of time reunification services would normally be provided for, in this case, six months.

Father's counsel requested that the juvenile court order one in-person visit per month, which would take place in an open visitation room, although father would be in chains. The juvenile court denied the request and ordered only monthly photographs of N.B. while father was incarcerated. The trial court stated that, if father was released within the six-month reunification period, he could file a section 388 petition requesting services.

DISCUSSION

I. DID THE TRIAL COURT ERR WHEN IT DENIED SERVICES TO FATHER PURSUANT TO SECTION 361.5, SUBDIVISION (e)(1)?

Father contends that the juvenile court erred when it denied him reunification services. Specifically, he argues that the juvenile court based its decision only on the fact that father was incarcerated and the statutory authority limiting reunification services to a child under the age of three; but failed to find that N.B. would suffer detriment if father received services, failed to consider father's desire to participate in such treatment and to reunify and be a good father to his daughter, and failed to consider the length or nature of treatment for him. Father also contends that the juvenile court failed to consider that none of the allegations against him involved physically abusing the children or harming them by his substance abuse. We find no error.

Generally, when the juvenile court removes a child from parental custody, it must provide the parent reunification services. (§ 361.5, subd. (a).) The duration of services is determined by the age of the child upon initial removal. (§ 361.5, subd. (a)(1)(A)-(C).) When, as here, a child is younger than three years old on the date of the initial removal from the parent's physical custody, reunification services are presumptively limited to six

months. (§ 361.5, subd. (a)(1)(B); *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843.) "'This strict time frame … is a recognition that a child's needs for a permanent and stable home cannot be postponed for an extended period without significant detriment….' [Citations.]" (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 474 (*Joshua M.*).)

Notwithstanding the general mandate to provide reunification services, the Legislature has determined that attempts to facilitate reunification in certain situations do not serve and protect the minor's interests. (*Joshua M., supra*, 66 Cal.App.4th at p. 467.) As such, it enacted certain exceptions where the juvenile court may deny a parent reunification services. Once such exception is section 361.5, subdivision (e)(1), the basis upon which the juvenile court denied father reunification services.

Section 361.5, subdivision (e)(1) provides that if a parent is incarcerated, the juvenile court "shall order" reasonable services unless the court determines, by clear and convincing evidence, that services would be detrimental to the child. In determining detriment, the juvenile court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime, the degree of detriment to the child if services are not offered, and "any other appropriate factors." (§ 361.5, subd. (e)(1).) In prescribing these "detriment" factors for the juvenile court's consideration, subdivision (e) "does not require that each listed factor exist in any particular case, nor does it specify how much weight is to be given to a factor bearing on detriment, listed or not." (*Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13, 18-19 [where the juvenile court "accorded significant weight to three of the factors listed in section 361.5, subdivision (e)(1), 'nature of the crime,' 'age of the children,' and 'degree of parent-child bonding' in determining that family reunification services to petitioner would be detrimental to the children."].)

Here, the juvenile court expressly found that providing father reunification services would be detrimental to N.B. On appellate review of a juvenile court's factual

determinations and exercise of discretion in a dependency matter, we must uphold the judgment if it is supported by substantial evidence. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) In this case, we conclude substantial evidence supports a finding that services would be detrimental.

N.B. was born in April of 2014 while father was in custody. Consequently, they have had no contact with each other and do not share a parent-child bond. And because father had been in custody since November of 2013, he was not even present for most of mother's pregnancy with N.B.

While father claimed to want treatment for his substance abuse issue, he had not yet bothered to read the referrals sent to him by the social worker. Although he claimed to be in a "skills program" while in custody, the program was not a drug treatment program. And although AA/NA was available to him, he had attended only one meeting, a month or so previous.

Because N.B. was under age three, section 361.5, subdivision (a)(2), limited court-ordered services to six months from the date the agency removed her from the physical custody of her parents. This relatively short period reflects a public policy that it is imperative to place a young child in a permanent, loving home where she can bond with her caregivers. "[C]ourt-ordered services may be extended up to a maximum time period not to exceed 18 months … if it can be shown … that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period." (§ 361.5, subd. (a)(3).) But it was not certain how long father would be in custody, and the juvenile court could reasonably conclude that father, once released, would not be in a position to take custody of his child.

Furthermore, although father claimed to have completed various drug treatment, anger management and parenting programs in the past, it did not prevent him from relapsing into that destructive behavior. Father's past also evidenced a need for intensive

and lengthy treatment if services were granted and the juvenile court noted that father was incarcerated "a lot," making it difficult to treat the issues that lead to both dependency and repeated incarceration.

Father cites to several cases in an attempt to distinguish his current crimes as less "serious" than those found to be adequate to deny reunification services. (See, e.g., *In re Alexis M.* (1997) 54 Cal.App.4th 848, 850-851 [services bypassed for killing infant sibling]; *Edgar O. v. Superior Court*, *supra*, 84 Cal.App.4th at pp. 15, 18 [services bypassed for killing children's mother].) But father had an extensive criminal record and a substance abuse history, which had not deterred him from his current criminal endeavors. The victim of his alleged current domestic violence offense was mother, and he committed the alleged current crime in front of mother's two older children. And since father did not seem to think his anger management issues had an effect on the older children, although they expressed continued fear of him, it was likely he would not recognize the effect it might have on N.B. either. Despite father's attempts to minimize his behavior, his charge of corporal injury is a form of serious violence and is directly related to his parenting abilities.

As noted above, it was not known what the length of father's custody would be. And while the juvenile court did specifically mention this, more importantly it noted father's current custody was directly related to the issues that brought N.B. before the juvenile court, namely domestic violence and substance abuse. Those were issues which father had attempted to address in the past, without success. It was reasonable for the juvenile court to conclude that father would not likely be able to adequately complete the necessary programs within the potential reunification period.

Nothing in the record suggests N.B. would suffer detriment if father did not receive reunification services. N.B. was placed into a foster home with her older two half siblings. Mother had completed her substance abuse treatment and, if she was able to

sever her relationship with father, could possibly regain custody of all three of her children. The absence of detriment to N.B. if services were not offered weighed in favor of a finding that reunification services would be detrimental to N.B.

The factors listed in section 361.5, subdivision (e)(1) supported the juvenile court's finding that offering reunification services to father would be detrimental to N.B. (*In re James C.* (2002) 104 Cal.App.4th 470, 485.) As such, we conclude substantial evidence supports the juvenile court's order denying reunification services to father.

II. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED IN-PERSON VISITATION BETWEEN FATHER AND N.B. WHILE HE WAS INCARCERATED?

The juvenile court order allowed father once a month in-person visits if father was not incarcerated. While incarcerated, visitation would be in the form of cards, letters, pictures or phone calls. Father contends the juvenile court did not make a finding that visitation would be detrimental to N.B., and therefore abused its discretion when it denied him in-person visitation with N.B. We disagree.

Visitation is considered an essential component of a reunification plan. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580.) In order to maintain ties between the parent and any siblings and the child, and to provide information relevant to deciding if and when to return a child to the custody of his or her parent, visitation shall be as frequent as possible, consistent with the well-being of the child. (§ 362.1, subd. (a)(1)(A).) Visitation is no less crucial for an incarcerated parent receiving reunification services. (§ 361.5, subd. (e)(1); *In re Dylan T.* (1998) 65 Cal.App.4th 765, 770 (*Dylan T.*); *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1407-1408.) As such, when reunification services are being provided, it is error to deny visitation with the parent to whom the services apply unless there is sufficient evidence that visitation would be detrimental to the child. (*Dylan T., supra,* at pp. 773-774 [denial of visitation improperly based on

minor's age alone]; *Brittany S., supra,* at p. 1407 [denial of visitation improper where mother incarcerated only 40 miles distant].)

However, where reunification services are denied, section 361.5, subdivision (f), provides that, "[t]he court *may* continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." (Italics added.) Visitation is not integral to the overall plan when the parent is not participating in reunification efforts, so the juvenile court has discretion to permit or deny visitation when reunification services are not ordered, unless it finds visitation would be detrimental to the child, in which case is must deny visitation. (*In re J.N.* (2006) 138 Cal.App.4th 450, 458-459.)

For this reason, we review the juvenile court's order denying visitation under section 361.5, subdivision (f), for abuse of discretion. (*In re J.N., supra,* 138 Cal.App.4th at p. 459.) The test for whether the juvenile court abused its discretion is whether the trial court exceeded the bounds of reason, and this standard warrants application of a very high degree of deference to the decision of the juvenile court. (*Ibid.*)

Father cites *Dylan T.,* and argues that N.B.'s young age alone may not be the basis for denial of visitation. (*Dylan T., supra,* 65 Cal.App.4th at pp. 773-774.) But *Dylan T.,* as noted above, was a situation in which reunification services had been ordered. Here, reunification services were not ordered and the issue of crucial bonding with a parent is not the goal. (*In re J.N., supra,* 138 Cal.App.4th at pp. 458-459.)

N.B. is an infant and there was no evidence presented at the hearing that she had formed a relationship with father or even met him, or that visitation would benefit N.B., who was too young to appreciate a visit. Father would be chained and not allowed to hold the baby during any in-person visitation while in custody. Thus, there was no substantial relationship that would suffer or erode in the absence of in-person visitation.

Furthermore, father's incarceration and the host of issues he needed to resolve, including substance abuse and issues of domestic violence, before he might obtain

custody and provide a home for N.B., were not possible within the statutory time limits. (§ 361.5, subd. (a)(1)(B).) Under these circumstances, we cannot say the juvenile court abused its discretion in denying in-person visitation while father was in custody. Father has no prospects of gaining custody and there was no evidence of any parent-child relationship. No finding of detriment to N.B. was necessary.

Even if a finding of detriment had been required, there was ample evidence that visitation would be detrimental to N.B. and that denial of visitation was in N.B.'s best interests. Father's repeated criminal activity and incarcerations demonstrated that he had not resolved the problems that harmed mother and her older children. He continued to fail to deal with his drug problem, was often incarcerated, and, when not incarcerated, inflicted his debilitating lifestyle on mother and her older children, and would likely do so to N.B. as well. Without father's influence in her life, mother had shown some promising improvements in her ability to offer the children a good home. Father has not established that the juvenile court abused its discretion by denying in-person visitation with N.B. while he was incarcerated.

DISPOSITION

The orders appealed from are affirmed.

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Franson, J.

WE CONCUR:

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Cornell, Acting P.J.

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Gomes, J.